

PUBLIC PROSECUTOR v. DR. NADASON  
KANAGALINGAM

[O.Cr.J. (Wan Mohamed J.), June 9, 1984]

[Kota Kinabalu — Criminal Trial No. 1 of 1980]

*Penal Code, s.312 — Miscarriage — Voluntarily causing a woman with child to miscarry — Defence of good faith to save life of woman.*

*Criminal Law & Procedure — Sentencing — Voluntarily causing miscarriage — Sentencing — Obstetrician sentenced to fine of \$3,500 in default 4 months' imprisonment.*

The accused, an obstetrician and gynaecologist, was charged under section 312 of the Penal Code for voluntarily causing a woman with child to miscarry and such miscarriage was not done in good faith for the purpose of saving her life. At the close of the prosecution case, the learned judge found that the prosecution had proved all the three ingredients beyond any reasonable doubt, viz. (1) the woman who was caused to miscarry was pregnant; (2) the accused voluntarily caused her to miscarry; and (3) the miscarriage was not caused by the accused in good faith for the purpose of saving the life of the woman. The events showed that the accused had not given reasonable consideration and neither had he come to a reasonable conclusion that he had to cause the woman to miscarry in order to save her life. There was no indication that her life was or would be in danger if pregnancy was allowed to continue. The woman had tubal ligation done on her by the accused in 1977. She was examined by the accused on August 8, 1978 and was found to be about fourteen weeks pregnant and to have enlarged varicose veins. The accused instantly gave her an injection of 150 c.c. saline and told her that she would be in labour within 48 hours. The next day she was admitted to his clinic and on August 10, 1978 a male foetus was aborted.

The accused was called upon to enter his defence. He gave evidence on oath. His defence was that he performed the abortion in good faith for the purpose of saving the life of the woman, who was suffering from bad or enlarged varicose veins which might cause pulmonary embolism. Prof. Sinnathuray, a highly qualified expert obstetrician and gynaecologist, supported the accused and gave his opinion that the abortion performed by the accused was justified.

**Held:** (1) the burden of proof both in English law and the Penal Code that procuring of the miscarriage is not done in good faith to save the life of the woman is on the prosecution;

(2) the support and approval by Prof. Sinnathuray for the abortion performed by the accused was not supported by reasonable explanation and the professor was not free from a motivation to help a friend (accused) out of trouble. No reasonable person whether a qualified surgeon or not would perform or procure abortion in the circumstances of this case without infringing the law at its stands. Procuring an abortion is a serious matter and it should only be done as a last resort to save the life of a woman or to save a woman from becoming a mental wreck.

(3) from evidence adduced, the accused had not given reasonable thought and had not taken enough steps to ex-

**A** amine the woman further. The accused had failed to rebut or throw any reasonable doubt on the prosecution case, and was therefore guilty as charged.

(4) the accused was fined \$3,500, in default four months' imprisonment.

*Case referred to:*

**B** (1) *R. v. Bourne* [1939] 1 K.B. 687.

## CRIMINAL TRIAL.

**C** *Abdul Ghani Patail* (Federal Counsel) for Public Prosecutor.

*Raja Abdul Aziz Addruse* (Dr. Yaacob H. Merican with him) for the accused.

*Cur. Adv. Vult.*

**D** **Wan Mohamed J.:** The abovenamed accused, an obstetrician and gynaecologist, is charged under section 312 of the Penal Code for voluntarily causing a woman with child to miscarry and such miscarriage was not done in good faith for the purpose of saving the life of the woman. The ingredients required to be proved by the prosecution are as follows:—

- E**
- (1) That the woman who was caused to miscarry was pregnant;
  - F** (2) That the accused voluntarily caused her to miscarry;
  - (3) That such miscarriage was not caused by the accused in good faith for the purpose of saving the life of the woman.

**G** At the close of the case for the prosecution, I find that the prosecution had proved all the above three ingredients beyond any reasonable doubt. There is clear evidence given by PW.1, PW.2, PW.6 and PW.7 that the woman was with child or pregnant. PW.6 and PW.7 testified beyond reasonable doubt that accused was the one who voluntarily caused the woman to miscarry and PW.2 testified that a 4" male foetus was aborted. All these facts are also found in the statement of the accused to the police which was admitted in evidence as Exh. P4-A and P4-B. The third ingredient that such miscarriage was caused by the accused not in good faith for the purpose of saving the life of the woman was established by the prosecution beyond reasonable doubt through the testimony of PW.7 (the woman) and the medical record of the woman (Exh. P1). From the evidence adduced, I find that the accused had given no

consideration to justify his act in causing the woman to miscarry. From the sequence of events revealed to the Court, I can safely come to a positive conclusion that the accused had not given reasonable consideration and neither had he come to a reasonable conclusion that he had to cause the woman to miscarry in order to save her life. In fact there is no indication at all that the life of the woman was or would be in danger if pregnancy was allowed to continue. The sequence of events which I referred to above are:—

- (i) The woman (PW.7) after giving birth to her second child decided not to have anymore children and had tubal ligation done on her by the accused on April 19, 1977;
- (ii) The woman went to see accused on August 8, 1978. She complained of feeling nauseous, tiredness and had had no periods for the last six months. She was examined by the accused who found her to be about fourteen weeks pregnant and that she had enlarged varicose veins. The accused instantly gave her an injection of 150 c.c. saline and told her that she would be in labour within forty-eight hours;
- (iii) The next day, i.e. on August 9, 1978, at about 9.00 p.m., the woman was admitted to the accused's clinic with some labour pains and at about 5.10 a.m. on August 10, 1978 a 4" male foetus was aborted.

From the above facts and also the contents of the medical record (Exh. P1) which reads:—

"B.T.L. (Bilateral Tubal Ligation) post partum done 19.4.77 (done after giving birth on 19.4.77).

Amen. 6/12 (meaning no menstruation for 6 months) but did not think she was pregnant because periods usually irregular. OE (on examination) ut (uterus) 14/40 size (distended to the size of 14 weeks pregnancy). Enlarged v. veins (the woman had enlarged varicose veins). Request for termination (the woman requested for pregnancy to be terminated) saline 150 cc (injection of 150 cc of saline was administered on the woman to start the process of abortion)."

I can safely infer that the accused caused the miscarriage on the woman, most likely with her consent, to comfort her of her annoyance and also to suppress, to a certain extent, the fact that the tubal ligation was a failure. In other words, that the tubal ligation on the woman was a failure would not be known to a larger circle of the members of the public compared to the instance where the pregnancy was allowed to end in a normal birth. The burden of proof on the prosecution that such a

A miscarriage was not caused in good faith in order to save the woman's life is a negative requirement which I think cannot be proved by a positive act of the accused, or anyone concerned. The prosecution will probably have to depend on the negative facts or non-existence of facts which would indicate that it was done in good faith in order to save the life of the woman. Otherwise the prosecution will have to depend on the inference from the evidence adduced that there is no ground to show that the miscarriage was caused in good faith in order to save the woman's life.

C Having satisfied that all the ingredients required to be proved by the prosecution are established, I called upon the accused to enter his defence. It is to be noted that the counsel for the accused did not submit no case to answer at the close of the case for the prosecution. I was therefore free from considering their arguments or submissions at that stage.

E The accused gave evidence on oath and the only point or issue which he sought to rebut in the case for the prosecution is that he performed the abortion on the woman in good faith for the purpose of saving the life of the woman. On this point he stated that the woman was suffering from bad or enlarged varicose veins. According to him F the varicose veins which the woman had or suffered in the third pregnancy which led him to perform the abortion was worse than what she had when she was carrying her second child. He went on to explain that the woman might die of pulmonary embolism. DW.2, Prof. Sinnathuray, the G Dean of the Faculty of Medicine, University Malaya, Kuala Lumpur, a highly qualified expert whose field is obstetrics and gynaecology, gave some explanation supporting the evidence of the accused in that bad varicose veins can cause blood clots and result in pulmonary embolism. The professor quoted a figure from a book reporting on a study made in the United Kingdom that 27.5 out of every 10,000 pregnancies died due to pulmonary embolism but pulmonary embolism can be caused by various other diseases. There are no statistics to show from the 27.5 cases of pulmonary embolism how many were caused by varicose veins. DW.2 went on to say that the best person to judge how bad was the patient having varicose veins was the one who examined her, i.e. the accused, at the time of her pregnancy. He added that he supported and gave his opinion that the abortion performed by the accused is justifiable.

The counsel for the accused in his written submission at the close of the case for the defence argued that the prosecution has failed to prove beyond reasonable doubt that the accused did not procure the miscarriage of the woman in good faith for the purpose of saving her life. He quoted *R. v. Bourne*<sup>(1)</sup> where a surgeon was charged for performing an abortion on a girl who was pregnant as a result of being raped under section 58 of the Offences against the Person Act, 1861, Laws of England (24 and 25 Vict. C100). Although it is not identical with section 312 of the Penal Code the provisions relating to facts not amounting to the offence are similar.

Section 4(1) is to be read together with section 58 of the Offences Against the Person Act (English Law):—

“... Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose of preserving the life of the mother.”

Section 312 of the Penal Code:—

“... if the miscarriage be not caused in good faith for the purpose of saving the life of the woman ...”

The burden of proof both in English Law and the Penal Code that procuring of the miscarriage is not done in good faith to save the life of the woman is on the prosecution. As I have earlier held that the prosecution had proved this ingredient beyond reasonable doubt, I shall not elaborate further except that I am under a duty to examine as to whether the defence has rebutted or thrown any reasonable doubt into the case for the prosecution, in particular in respect of the ingredient that the accused procured such a miscarriage not in good faith for the purpose of saving the woman's life.

The counsel for the defence submitted that the accused being an obstetrician and gynaecologist himself should be taken as a proper person with authority to decide whether a miscarriage should be procured or otherwise in the circumstances of this case where the woman was suffering from bad or enlarged varicose veins. This proposition was supported by DW.2, Prof. Sinnathuray, whose specialised field is also in obstetrics and gynaecology. He is also the Dean of the Faculty of Medicine, University of Malaya. With due respect to his qualifications and high office, I find that his support and approval for the abortion performed by the accused was not supported by reasonable explanation

A and having observed his demeanour and from the circumstances of the matter, I find that he (DW. 2) is not free from a motivation to help a friend (the accused) out of trouble. I am of the opinion that no reasonable person whether a qualified surgeon or not would perform or procure abortion in the circumstances of this case without infringing the law as it stands. Procuring an abortion is a serious matter and it should only be done as a last resort to save the life of a woman or to save a woman from becoming a mental wreck. In this case, although it is argued that accused had performed the abortion on the woman in good faith in order to save her life or to save her from becoming a mental wreck, I find that the argument cannot hold water because from evidence adduced before me the accused had not given reasonable thought and had not taken enough steps to examine the woman further. His finding that the woman had enlarged or bad varicose veins is no other than the result of his mere clinical examination.

E For reasons stated above, I come to the conclusion that the accused has failed to rebut or throw any reasonable doubt into the case for the prosecution and I therefore find the accused guilty of the charge.

F The counsel for the accused in his plea in mitigation submitted that the accused has suffered mental agony for a very long time due to the fact that the case was pending for a very long time before the prosecution could make their witnesses available and have this case disposed of. On behalf of the accused the counsel prayed for leniency.

G The prosecution prayed to the court for an adequate sentence on the accused taking into consideration the seriousness of this case.

H As there was no evidence adduced to the effect that the woman was quick with child, the offence committed in this case is punishable with an imprisonment for a term which may extend to three years, or with fine, or with both.

I Having considered the circumstances under which this offence was committed and taking into consideration the submissions of both the defence and the prosecution, I sentence the accused to a fine of \$3,500/—, in default four months' imprisonment.

*Sentenced accordingly.*

Solicitors: *Dr. Yaacob & Ismail.*